NO. 48831-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

STEVEN WAYNE TOWER
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable Nelson Hunt, Judge

CORRECTED BRIEF OF APPELLANT

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2. Appellant assigns error to conclusion of law 2.1—that the stop of Mr. Tower was valid.

3. Mr. Tower was not committing an infraction by walking along the side of the road, with the flow of traffic.

4. Appellant assigns error to conclusion of law 2.2.

5. Appellant assigns error to conclusion of law 2.3.

6. The identification, detention, and arrest of Mr. Tower was not justified under Washington law.

7. Appellant assigns error to conclusion of law 2.4.

8. The discovery of the items in Mr. Tower's pocket was pursuant to an invalid search incident to arrest.

Issues Presented on Appeal

1. Did the police search and seize Mr. Tower without lawful authority, without a warrant or an exception and was their infraction notice a pretext to obtain Mr. Tower's identity to search for warrants?

2. Was the search incident to arrest unlawful when the reason for asking for identification was pretextual?

3. Did the trial court commit error by denying the motion to suppress the methamphetamine that was obtained by an unlawful search and seizure?

4. Did the evidence that there was no sidewalk or

shoulder on SR 408 preclude a finding that Mr. Tower committed an infraction by walking with the flow of traffic where RCW 46.61.250(b) only requires a person to walk against traffic when "practical"?

B. STATEMENT OF THE CASE

1. Procedural Facts

Mr. Tower was charged and convicted by a jury of unlawful possession of methamphetamine. CP 33, 38-49. This timely appeal follows. CP 50-62.

2. 3.6 Hearing

Mr. Tower challenges the following finding of fact entered by the trial court following the 3.6 Hearing.

> 1.5 Deputy Van Wyck knew that it was illegal for a person to be walking along the side of the road in the same direction as traffic. According to Deputy Van Wyck, a person is to walk along the side of the road facing traffic.

CP 13-15.

The challenged Conclusions of Law are as follows:

> 2.1 The stop of Mr. Tower was valid. Mr. Tower was committing an infraction by walking along the side of the road, with the flow of traffic.
>
> 2.2 Mr. Tower was committing a traffic infraction by walking along the road, with the flow of traffic.

> 2.3 The identification, detention, and arrest of Mr. Tower was justified under Washington law.
>
> 2.4 The discovery of the items in Mr. Tower's pocket was pursuant to a valid search incident to arrest.

CP 13-15.

Counsel disputed these findings and conclusions and moved for suppression of the evidence because the state did not establish that Mr. Tower committed and infraction under RCW 46.61.250(2), and there was no exception to the warrantless intrusion. RP 17-18; CP 7-8. The trial court denied the motion. CP 13-15.

3. Relevant Facts

Officer Van Wyck saw a man walking with traffic on SR 408 at dusk. RP 52-53. Officer Van Wyck stopped the man to obtain his identity to run a warrants check and for safety reasons to warn him to walk facing traffic. Id. After waring the man to walk on the other side of the street, Officer Van Wyck asked the man for identification so that he could run a warrants check. RP 54-55.

> I activated my back lights to my patrol car for vehicles to go around us so that they wouldn't hit us, and then **I got out and made contact with Mr. Tower to identify who he was** and to advise him that he needed to walk

> on the other side of the roadway. It's illegal to walk on the same side of the roadway as we were at. Also as well for his safety.

RP 53.

Officer Van Wyck testified at the 3.6 hearing that he believed that the man, later identified as Mr. Tower, was committing an infraction by walking on the road facing traffic, but he did not intend to cite him, but was just going to warn him to move over for safety concerns. RP 5-10. The only information about the roadway was that it did not have a sidewalk or a shoulder on either side. RP 57.

After asking Mr. Tower to walk on the other side of the street, Officer Van Wyck asked Mr. Tower to provide his name and date of birth. RP 7, 53-54. Mr. Tower complied and walked away. RP 53. When Officer Van Wyck was waiting to confirm an outstanding warrant, he re-contacted and detained Mr. Tower. RP 53-55. Once the warrant was confirmed, Officer Van Wyck searched Mr. Tower and found a small amount of methamphetamine in Mr. Tower's front jeans coin pocket . RP 54-55, 65.

C. ARGUMENT

> APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS WERE VIOLATED BY A SEARCH AND SEIZURE OF HIS PERSON WITHOUT

LAWFUL AUTHORITY.

The police stopped Mr. Tower for safety reasons, a valid purpose, and to seek identification to run a warrants check, an invalid purpose. RP 53.

The police had no legal authority to ask Mr. Tower for identification to run a warrants check once the officer warned Mr. Tower to cross the street for safety, because the initial stop was pretextual under *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). Specifically, the police may not use an infraction to stop a citizen to conduct a criminal investigation. *Ladson*, 138 Wn.2d at 349.

> We begin our analysis by acknowledging the essence of this, and every, pretextual traffic stop is that the police are pulling over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving. Therefore the reasonable articulable suspicion that a traffic infraction has occurred which justifies an exception to the warrant requirement for an ordinary traffic stop does not justify a stop for criminal investigation.

Ladson, 138 Wn.2d at 349.

The Fourth Amendment to the United States Constitution and Wash Const. art. 1, § 7 prohibits unreasonable searches and seizures. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065

(1984). Under these provisions, warrantless searches are "per se" unreasonable. *State v. Walker*, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998).

Here, the state executed an unlawful search and seizure in violation of state and federal constitutional protections by searching Mr. Tower without a warrant and without any other authority of law. Id. Courts are responsible for enforcing legally protected expectations of privacy. *State v. Afana,* 169 Wn.2d 169, 176, 233 P.3d 879 (2010). When a party claims both state and federal constitution violations, the reviewing Court first examines the state constitution. *Afana,* 169 Wn.2d at 176, (quoting *State v. Patton,* 167 Wn.2d 379, 385, 219 P.3d 651 (2009)).

The State bears the burden of establishing an exception to the warrant requirement. *State v. Schultz*, 170 Wn.2d 746, 754, 248 P.3d 484 (2011); *State v. A.A.*, 187 Wn.App. 475, 481, 349 P.3d 909 (2015).

a. Article 1, Section 7

Article I, section 7, is not concerned with the reasonableness of a search, but instead requires a warrant before any search, whether reasonable or not. *State v. Eisfeldt,* 163 Wn.2d 628, 634, 185 P.3d

580 (2008); *State v. Monaghan*, 165 Wn.App.782, 787, 266 P.3d 222 (2012); *State v. Morse,* 156 Wn.2d 1, 9, 123 P.3d 832 (2005). "This creates an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions....". *State v. Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009) (internal quotation marks and citations omitted). Because article I, section 7, provides greater protection to individuals than the Fourth Amendment, it is the proper analytic framework for this issue. *Eisfeldt,* 163 Wn.2d at 636.

Article I, section 7 of the state constitution provides: "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Thus, where the Fourth Amendment precludes only "unreasonable" searches and seizures without a warrant, article I, section 7 prohibits any disturbance of an individual's private affairs "without authority of law." *Valdez,* 167 Wn.2d at 772. Article I, section 7 thus prohibits both unreasonable searches, including those that would be considered reasonable under the Fourth Amendment. *See York v. Wahkiakum Sch. Dist. No. 200,* 163 Wn.2d 297, 305–06, 178 P.3d 995 (2008).

"The term 'private affair [ ]' generally means 'those privacy interests which citizens of this state have held, and should be entitled

to hold, safe from governmental trespass.' " *State v. Athan,* 160 Wn.2d 354, 366, 158 P.3d 27 (2007) (quoting *State v. Myrick,* 102 Wn.2d 506, 511, 688 P.2d 151 (1984)). "In determining if an interest constitutes a 'private affair,' the Court looks at the historical treatment of the interest being asserted, analogous case law, and statutes and laws supporting the interest asserted." *Athan,* 160 Wn.2d at 366 (quoting *Myrick,* 102 Wn.2d at 511).

If the Court determines that the interest asserted constitutes a "private affair," the second step asks whether the authority of law required by article I, section 7 justifies the intrusion. *Valdez,* 167 Wn.2d at 772. This requirement is satisfied by a valid warrant, limited to a "few 'jealously and carefully drawn exceptions." *State v. Hendrickson,* 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (internal quotation marks omitted) (quoting *State v. Houser,* 95 Wn.2d 143, 149, 622 P.2d 1218 (1980).

While police may talk to a person walking down the street to engage in a social contact, when the police ask for information for the sole purpose of running a warrants check, the request for identification is not within the realm of a permissible social contact, but rather an impermissible pretext. *Ladson*, 138 Wn.2d at 349; *State*

v. Young, 135 Wn.2d 498, 511, 957 P.2d 681 (1998).

In *Ladson*, our state supreme court held impermissible under article 1, section 7, a police stop based on an objectively reasonable purpose such as for an apparent infraction but for the underlying purpose of investigating a person without reasonable articulable suspicion or any other exception to the warrant requirement. *Ladson,* 138 Wn.2d at 350-353, 355-58. In *Ladson,* the stop was a pretext for an investigation to discover grounds which would justify yet a further search.

In *Young,* the Supreme Court decided that the shining of a spotlight onto an individual walking at night "reveal[s] only what was already in plain view" and does not amount to a per se intrusion into private affairs without more, such as "some positive command" from the officer. *Young*, 135 Wn.2d at 513-14.

Subsequently, in *O'Neill,* the Supreme Court, citing its decision in *Young,* decided that an officer did not unconstitutionally intrude into O'Neill's private affairs when the officer shined a spotlight on O'Neill's parked vehicle, approached the car using a flashlight to illuminate the interior, asked O'Neill to roll down his window, and asked for his identification. *State v. O'Neill,* 148 Wn.2d 564, 578-81, 62 P.3d 489

(2003). The court looked at the officer's actions in their totality and determined that only **when** the officer asked O'Neill to step out of the car after learning that O'Neill was driving with a suspended license did the officer seize O'Neill. *O'Neill,* 148 Wn.2d at 582.

Under these cases, Mr. Tower was unlawfully when Officer Van Wyck, without reasonable articulable suspicion of criminal activity, and without a warrant, decided to run a warrants check. Id.

Several passenger cases also support Mr. Tower's argument that article 1, section 7 prohibits law enforcement officers from requesting identification from passengers for investigative purposes unless there is an independent basis justifying the request, meaning an articulable suspicion of criminal activity for that passenger. *State v. Rankin*, 151 Wn.2d 689, 699, 92 P.3d 202 (2004); *State v. Brown,* 154 Wn.2d 787, 797, 117 P.3d 336 (2005). Accordingly, a mere request for identification of a passenger for investigatory purposes constitutes a seizure. *Rankin,* 151 Wn.2d at 697; *Brown,* 154 Wn.2d at 798.

Rankin involved a lawful traffic stop where the police asked the passengers for identification. The officer used Rankin's identification to find an outstanding warrant. A second passenger dropped a baggie

containing white powder when he reached into his pocket to retrieve his identification. Our Supreme Court held that an unlawful seizure occurred in both instances because the officer requested the passengers' identification without a reasonable suspicion of criminal activity. *Rankin*, 151 Wn.2d at 699.

In *Brown*, the defendant was a passenger in a car that the police lawfully stopped for a traffic infraction. An officer asked the passenger to give his name, birth date, and state of residence. The passenger provided false information. The officer ran a warrant check but could not locate any records that matched the name and birth date provided. The officer then asked the passenger to confirm the information and, when two later checks returned no records, he asked the passenger to produce some identification. The passenger said he had left his identification in California, but allowed the officer to check his pockets. The officer found stolen credit cards. He then arrested the passenger. The forged credit cards led to additional incriminating evidence and the passenger was convicted of numerous offenses. *Brown*, 154 Wn.2d at 791- 92.

In reversing the conviction, the Supreme Court held that the officer unconstitutionally seized the passenger when he first asked his

name and ran a warrant check without any articulable suspicion of wrongdoing. *Brown,* 154 Wn.2d at 797-98. The court stated that the officer "was required to have an articulable suspicion of criminal activity *before* he seized Brown" and that the information gained when he asked Brown to identify himself could not be factored into the "articulable suspicion" equation. *Brown,* 154 Wn.2d at 798.

Under *Brown* and *Rankin*, once Officer Van Wyck asked Mr. Tower for his name and date of birth and used that information to run a warrants check, Mr. Tower was unlawfully seized. Accordingly, the evidence of the methamphetamine in Mr. Tower's pocket was obtained in violation of article 1, section 7 making it inadmissible as the result of an unlawful search and seizure. *Rankin*, 151 Wn.2d at 699. Moreover, as in *Brown*, the subsequent discovery of a warrant could not be factored into the "articulable suspicion" equation. *Brown,* 154 Wn.2d at 798. Rather, the absence of reasonable articulable suspicion at the time the offer ran the warrants check, irreversibly made the search unlawful. Id.

The trial court erred in denying the motion to suppress.

b. Standard of Review For Findings of Fact and Conclusions of Law.

The trial court erred in failing to suppress the evidence

following the 3.5 and 3.6 hearings. The standard of review on denial of a motion to suppress is to review the trial court's decision for substantial evidence. *Schultz*, 170 Wn.2d at 753. This Court reviews conclusions of law de novo. Evidence seized during an illegal search and seizure must be suppresses under the exclusionary rule. *State v. Gaines*, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005).

c. Emergency Exception

Our Courts have long held that "[w]hen the use of the emergency exception is challenged on appeal, the reviewing court must satisfy itself that the claimed emergency was not simply a pretext for conducting an evidentiary search." The search must not be primarily motivated by intent to arrest and seize evidence. *State v. Angelos*, 86 Wn.App. 253, 256-57, 936 P.2d 52 (1997) (*citing State v. Nichols*, 20 Wn.App. 462, 464, 581 P.2d 1371 (1978) *review denied*, 133 Wn.2d 1034, 950 P.2d 478 (1998).

The Supreme Court in *Ladson,* cited *Angelos* with approval, and reiterated its commitment to prohibiting pretextual stops based on an emergeny. *Ladson*, 138 Wn.2d at 357. "Our courts continue to follow the no-pretext rule in cases of warrantless searches pursuant to the emergency exception." *Ladson*, 138 Wn.2d at 357.

> The ultimate teaching of our case law is that the police may not abuse their authority to conduct a warrantless search or seizure under a narrow exception to the warrant requirement when the reason for the search or seizure does not fall within the scope of the reason for the exception.

Ladson, 138 Wn.2d at 357.

The state may argue that Officer Van Wyck responded to a safety emergency by contacting Mr. Tower. This is incorrect because the use of the purported emergency was a pretext to gain Mr. Tower's identification to run a warrant check. Under *Ladson,* this was impermissible and the methamphetamine must be suppressed as the result of an unlawful search. *Ladson*, 138 Wn.2d at 360 (citing *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986).

d. Fourth Amendment Community Caretaking

The community caretaking function, which allows for limited searches when it is necessary for police officers to render emergency aid or assistance, is also a recognized exception to the warrant requirement. *State v. Thompson*, 151 Wn.2d 793, 802, 92 P.3d 228 (2004). These are "divorced" from a criminal investigation. *Id.*

The community caretaking function exception was first announced in *Cady v. Dombrowski,* 413 U.S. 433, 441, 93 S.Ct. 2523,

37 L.Ed.2d 706 (1073) which observed with respect to the Fourth Amendment of the United States Constitution that

> Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as *community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.*

(Emphasis added) *Cady*, 413 U.S. at 441. Our State Supreme Court in *State v. Kinzy*, 141 Wn.2d 373, 386, 5 P.3d 668 (2000), discussed *Cady* and explained that our cases have "expanded the community caretaking function to include not only the "search and seizure" of automobiles, but also situations involving either emergency aid or routine checks on health and safety. *Kinzy,* 141 Wn.2d at 386.

The police may stop a person to carry out their community caretaking functions under narrow circumstances, such as "a routine safety check [that] must (1) be necessary and strictly relevant to the community caretaking function and (2) **end** when reasons for initiating an encounter are fully dispelled." (Emphasis added) *State v. Moore*, 129 Wn.App. 870, 880, 120 P.3d 635 (2005) (citing *State v. Acrey*, 148 Wn.2d 738, 750, 64 P.3d 594 (2003)).

Applying this balancing test here, Officer Van Wyck's desire to ask Mr. Tower to cross the street for safety was relevant to the community caretaking function, but once he accomplished this goal, the community care taking function ended and the following demand for identification and running of a warrants check exceeded the police authority under the Fourth Amendment. *Moore*, 129 Wn.App. at 880; *Acrey*, 148 Wn.2d at 750.

Officer Van Wyck no longer had any remaining objective rationale predicated on safety concerns for himself or for Mr. Tower when asking Mr. Tower his name and date of birth. The only purpose for requesting identifying information was to impermissibly search for evidence of criminal activity. *Moore*, 129 Wn.App. at 880; *Acrey*, 148 Wn.2d at 750.

A.A., is a useful case in dispelling the notion that the police may search when exercising their community caretaking function. The police stopped A.A., citing, "The Family Reconciliation Act", which, "is designed to protect runaway children," under a purported community care function because A.A was a minor out at night. *A.A.,* 187 Wn.App. at 483, 488; RCW 13.32.A. A.A. did not pose a risk of harm to himself or others, but was "simply walking down the street

and did not appear dangerous." Id. The officer admitted he searched A.A. to find drugs or weapons after he had already conducted a pat down search that revealed that A.A did not have a weapon. *A.A.*, 187 Wn.App. at 488.

The Court of Appeals rejected the state's community care taking function as an exception to the search holding that a non - criminal protective custody situation does not permit a search of the contents of the person's pockets. Id.

Here too, Officer Van Wyck's desire to warn Mr. Tower to cross the street for safety reasons was a non-criminal purpose. Mr. Tower, like A.A. was not a danger to others, and if a danger to himself, that was remedied when the officer asked him to cross the street. As in *A..A.*, there was no need to ask for identification or to run a warrants check without reasonable articulable suspicion of criminal activity and without any valid exception to the warrant requirement.

The police here as in *A.A.*, simply wanted to look for contraband or warrants. RP 53; *A.A.*, 187 Wn.App. at 488. Under the community caretaking exception this was impermissible because the community caretaking function ended as soon as Mr. Tower crossed the street. *Moore*, 129 Wn.App. at 880; *Acrey*, 148 Wn.2d at 750.

The subsequent searchw as illegal and the fruits of that search should have been suppressed. *Ladson,* 138 Wn.2d at 360.

e. RCW 46.61.250 Did Not Provide An Exception To the Warrant Requirement.

Mr. Tower did not violate RCW 46.61.250(2), and Officer Van Wyck did not cite Mr. Tower for violating this statute. RP 6, 53. RCW 46.61.250(2) provides:

> (2) Where sidewalks are not provided any pedestrian walking or otherwise moving along and upon a highway shall, **when practicable**, walk or move only on the left side of the roadway or its shoulder facing traffic which may approach from the opposite direction and upon meeting an oncoming vehicle shall move clear of the roadway.

Id. (Emphasis added)

Here, the facts presented to Officer Van Wyck and in trial did not establish that it was in fact illegal for Mr. Tower to walk with his back to traffic, because when there are no sidewalks available, a pedestrian is only required to walk facing traffic where practical. RCW 46.61.250(2); *Stutz v. Moody*, 3 Wn.App. 457, 459, 476 P.2d 548 (1970). Here, there were no sidewalks on SR 408 and there was no testimony to indicate that it was practical to walk on the left side of the roadway. RP 6, 57.

The cases analyzing this statute predominately involve contributory negligence claims but are relevant and instructive in determining that Mr. Tower did not commit an infraction by walking on the right side of the no- shoulder highway. *Moody*, 3 Wn.App. at 459. This Court was the first appellate court to interpret RCW 46.61.250(2). *Moody*, 3 Wn.App. at 459. This Court held that RCW 46.61.250(2) does not create a mandatory requirement to walk on the left side of the roadway. *Moody*, 3 Wn.App. at 459-60.

"Whether it was practicable to walk only on the left side of the road facing oncoming traffic is a question of fact to be decided by the trier of fact." In *Moody*, the evidence indicated that there was a gravel shoulder that was slightly wider on the right side and that other pedestrians routinely walked on the right side of the road. *Moody*, 3 Wn.App. at 458.

This Court held that there was substantial evidence and inferences from the evidence to determine it would **not** be practicable to walk on the left side of the highway facing the oncoming traffic. *Moody*, 3 Wn.App. at 459-60.

Here, there was no evidence to indicate that it was practical or safe to walk on the left side of the street. The evidence describing the

road was extremely limited. "It's a two-lane road with no shoulder." RP 5. Following the 3.5 hearing, the prosecutor argued that it was reasonable to infer that it was "practical" to walk on the other side of the road because Mr. Tower did so when ordered to do so by the officer. RP 18, 47. This is not however evidence and most people would follow an officer's directive which does not in any manner indicate "practicality".

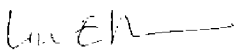
Finding of fact 1.5 is not supported by substantial evidence and must be vacated. CP14; *Schultz*, 170 Wn.2d at 753. Under a de novo review of conclusions of law conclusions of law 2.1, 2,2, 2,3 and 2.4, these conclusions are also not supported by valid findings and similarly must be vacated. Id. Because the methamphetamine was seized during an illegal search and seizure it be suppressed under article 1, section 7 and the exclusionary rule. *Gaines*, 154 Wn.2d at 716-17.

D. CONCLUSION

Mr. Tower respectfully requests this Court remand for suppression of the evidence and reverse and dismiss his conviction with prejudice.

DATED this 11th day of August, 2016.

Respectfully submitted,



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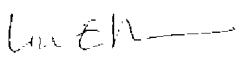

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